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MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Kelvin Dixon appeals the post-conviction court's denial of his petition for relief. Specifically, Dixon argues that the post-conviction court erred by denying his petition because (1) his trial counsel was ineffective for failing to make a motion for judgment on the evidence with regard to the rape charge at trial, and (2) his appellate counsel was ineffective for failing to challenge the sentences he received for his class A felony criminal deviate conduct and class C felony battery convictions. Finding no error, we affirm the judgment of the post-conviction court.

FACTS

As detailed in our memorandum decision affirming Dixon's convictions,

[t]he underlying facts disclose that on May 20, 2000, the victim[, K.H.,] was at home in her kitchen when her fiancé, Dixon, came into the kitchen, picked up a knife and grabbed her. The victim had just refused Dixon's order to stay in the bedroom. Dixon grabbed her neck, held the knife to the back of her neck, forced her back into the bedroom and said they were going to get "freaky." He forced her to perform oral sex and have vaginal intercourse with him. He then performed anal intercourse on her. The victim testified that during all this Dixon held two knives on her, one was the knife from the kitchen and the other he retrieved from a laundry hamper in the bedroom. She further testified that Dixon threatened her and her children throughout these events.

Dixon v. State, 49A05-0106-CR-232, slip op. at 2 (Ind. Ct. App. 2002).

On May 23, 2000, the State charged Dixon with class A felony rape, two counts of class A felony criminal deviate conduct, class B felony confinement, and class C felony battery. On August 4, 2000, the State filed a petition alleging Dixon to be a habitual offender. A jury trial began on April 9, 2001, and the jury found Dixon guilty as

charged. Dixon pleaded guilty to the habitual offender count. The trial court held a sentencing hearing on May 4, 2001, and the trial court sentenced Dixon to an aggregate term of 124 years imprisonment. Dixon appealed his convictions and we affirmed. Dixon, slip op. at 5.

On January 16, 2003, Dixon filed a pro se petition for post-conviction relief. Dixon filed a verified amendment to the petition on March 16, 2007, alleging that (1) his trial counsel was ineffective for not moving for judgment on the evidence with respect to the rape charge, (2) his appellate counsel was ineffective for not challenging the sufficiency of the evidence regarding the rape charge, and (3) his appellate counsel was ineffective for not challenging the sentences imposed on the criminal deviate conduct and battery convictions. The post-conviction court held an evidentiary hearing on June 20, 2007, and denied Dixon's petition on October 29, 2007, finding that

[i]n this case, [Dixon's] claim of ineffective assistance of trial counsel revolves around his counsel's alleged failure to move for judgment on the evidence on [the rape count]. [Dixon's] argument is that [the rape count] was charged as a class A felony, based on an allegation that the victim was compelled to submit by use of deadly force—specifically choking. [Dixon] points to the testimony adduced at trial, which tended to show that the choking that occurred in the case, occurred after the commission of the rape, but while the crimes charged were still occurring. [Dixon] argues that a motion for judgment on the evidence would necessarily have been granted, because of a failure of proof, and therefore his trial counsel was ineffective for having failed to make the motion.

Case law makes clear that the use of deadly force contemporaneous with the crime it is enhancing is not a mandatory requirement. In Richards v. State[, 681 N.E.2d 208 (Ind. 1997),] and Gonzalez v. State[, 532 N.E.2d 1167 (Ind. 1989),] the deadly force and threats of deadly force did not occur at the same time as the sex crimes, but [the] Indiana Supreme Court made clear that there is no requirement for a certain order of events. . . .

The Supreme Court characterized Gonzale[s's] argument as “untenable,” and noted that, while the deadly force occurred after the initiation of the crime and not in direct relation to the rape, it did occur while the criminal events were still occurring. Similarly in this case, while the deadly force charged—the choking—occurred after the initiation of the rape, it did occur while the crimes charged were being committed. . . .

. . . Factually, [Dixon's] case is somewhat similar to Koons v. State[, 771 N.E.2d 685 (Ind. Ct. App. 2002)]. Koons is a case that applies Spurlock v. State, 675 N.E.2d 312 (Ind. 1996)], in a context of a series of criminal offenses, and held that threats of deadly force that occurred after the sex crime charged, were nonetheless sufficient to elevate that crime to an A felony, because the threats facilitated other crimes committed against the same victim. . . .

Finally, the allegation regarding the type of deadly force used was surplusage. . . . The evidence adduced at trial was that [Dixon] grabbed the victim tightly around her neck, held her at knifepoint throughout the attack, choked and bit her. Thus, defendant was not misled in preparing a defense to the charge that rape was committed by the use of deadly force, nor was he harmed or prejudiced.

[Dixon] also alleges that his appellate counsel was ineffective for failure to raise two issues related to aggravating factors cited by the Court as part of sentencing. Specifically, [Dixon] claims that in enhancing the sentence on [the criminal deviate conduct conviction], the Court inappropriately considered the victims [sic] pain and suffering. Further [Dixon] argues that in aggravating the sentence on [the battery conviction], the Court relied on the seriousness of the victim's injury.

Regarding the sentence on [the criminal deviate conduct conviction], as noted above, the Court entered an enhanced sentence of forty years, to be served consecutively with [the rape conviction]. [The criminal deviate conduct conviction] involved a charge [] that while armed with a deadly weapon, [Dixon] forced the victim to submit to anal sex. In pronouncing sentence on this count, the Court gave the following explanation:

As to [the criminal deviate conduct conviction], the Court is going to sentence the defendant to forty (40) years in the Department of Correction. The Court is aggravating that sentence based on the nature and circumstances of the crime. Specifically, there was ample testimony from both police officers that following [Dixon's] sexual

assault to the anus of the victim that the victim was having a very difficult [time] sitting down. The Court notes the extreme pain and the violence of this act and that the elements are different. Therefore, the Court is going to enhance that sentence above the presumptive of forty (40) years—of thirty (30) years to forty (40) years. The Court is further going to run [the sentences for rape and criminal deviate conduct] consecutively with [the sentences for criminal deviate conduct and confinement].

[When pronouncing sentence on the battery count, the trial court gave the following explanation:]

Finally as it relates to the battery, as a class C felony, the Court is going to run that consecutive as well to [the sentences for the criminal deviate conduct and confinement convictions]. The Court is running that consecutive based on the nature and circumstances of the incident by [Dixon's] own admission, and by the photographs that were admitted into this court. I'm not sure that this Court or any other person associated with the criminal justice system has ever seen a bite mark the size of that which was taken out of [K.H.'s cheek], and due to the nature and circumstances of that incident the Court is running that consecutive.

. . . The Court therefore finds no error in the sentence on [criminal deviate conduct], and again appellate counsel cannot be held ineffective for failing to raise [Dixon's] meritless claims. . . .

As with the Court's resolution of [Dixon's] claims as sentencing on [the criminal deviate conduct conviction], the Court clearly considered the injury suffered by the victim only insofar as it was greater than the elements necessary to prove the commission of the offense. In so doing the Court did not exceed its authority, and therefore [Dixon's] appellate counsel was not ineffective for failing to raise this issue on direct appeal.

Appellant's App. p. 106-08, 110-12. Dixon now appeals the post-conviction court's denial of his petition for relief.

DISCUSSION AND DECISION

I. Standard of Review

We initially observe that a petitioner who has been denied post-conviction relief faces a “rigorous standard of review” on appeal. Dewitt v. State, 755 N.E.2d 167, 170 (Ind. 2001). The post-conviction court’s denial of relief will be affirmed unless the petitioner shows that the evidence “leads unerringly and unmistakably to a decision opposite” that reached by the post-conviction court. Williams v. State, 706 N.E.2d 149, 154 (Ind. 1999). The petitioner has the burden of establishing the grounds for relief by a preponderance of the evidence. Id. A petitioner who has been denied post-conviction relief is therefore in the position of appealing from a negative judgment. Collier v. State, 715 N.E.2d 940, 942 (Ind. Ct. App. 1999). We consider only the probative evidence and reasonable inferences therefrom that support the post-conviction court’s determination and will not reweigh the evidence. Bigler v. State, 732 N.E.2d 191, 194 (Ind. Ct. App. 2000).

II. Trial Counsel

Dixon argues that his trial counsel was ineffective for failing to move for a judgment on the evidence with respect to the rape charge. Specifically, Dixon emphasizes that the charging information alleged that he choked his victim to force her to submit to sexual intercourse but the evidence introduced at trial showed that, in fact, he choked her after the offense.

We review claims of ineffective assistance of counsel based upon the principles set forth in Strickland v. Washington, 466 U.S. 668 (1984). Specifically,

[a] claimant must demonstrate that counsel’s performance fell below an objective standard of reasonableness based on prevailing professional norms, and that the deficient performance resulted in prejudice. Prejudice

occurs when the defendant demonstrates that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” A reasonable probability arises when there is a “probability sufficient to undermine confidence in the outcome.”

Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting Strickland, 466 U.S. at 694).

Although the two parts of the Strickland test are separate inquiries, a claim may be disposed of on either prong. Williams v. State, 706 N.E.2d 149, 154 (Ind. 1999). According to the Strickland court, the “object of an ineffectiveness claim is not to grade counsel’s performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.” 466 U.S. at 697.

We further note that counsel is given wide discretion in determining strategy and tactics, and, therefore, courts will accord these decisions deference. Timberlake v. State, 753 N.E.2d 591, 603 (Ind. 2001). A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. Isolated omissions or errors, poor strategy, or bad tactics do not necessarily render representation ineffective. Stevens v. State, 770 N.E.2d 739, 747 (Ind. 2002). The burden is on the petitioner to establish that some action or inaction on the part of trial counsel had no strategic purpose. Clark v. State, 597 N.E.2d 4, 11 (Ind. Ct. App. 1992).

Dixon argues that his counsel was ineffective for failing to move for a judgment on the evidence with respect to the rape charge because there was no evidence that he choked K.H. to facilitate the offense. Trial Rule 50 provides that a party may move for

judgment on the evidence where all of some or the issues in a case tried before a jury are not supported by sufficient evidence. A judgment on the evidence is properly granted only where there is a total absence of evidence as to the guilt of the accused or where the evidence is without conflict and susceptible to only one inference that is favorable to the defendant. DeWhitt v. State, 829 N.E.2d 1055, 1063 (Ind. Ct. App. 2005). If the evidence is sufficient to sustain a conviction on appeal, then a motion for directed verdict is properly denied. Proffit v. State, 817 N.E.2d 675, 680 (Ind. Ct. App. 2004).

Evidence was introduced at trial that K.H. unwillingly submitted to sexual intercourse with Dixon because he threatened her with two knives. Specifically, Dixon had a knife when he told K.H. to remove her clothing. Tr. p. 482. After she removed her clothing, Dixon grabbed a second knife and told her to “get on the bed.” Id. at 483. Dixon forced K.H. to perform oral sex and told her that if she did not comply he would “stab [her] in the back of [her] neck.” Id. at 484. After the oral sex, Dixon got on top of K.H. and forced her to have intercourse with him while holding “the knives in his hands.” Id. at 485. During the intercourse, Dixon “almost stabbed [K.H.] in the arm but [she] jerked away.” Id. He then forced her to engage in anal sex and told her that “if [she] screamed that he would stab [her].” Id. at 486. After the encounter, K.H. went downstairs and called 911. Id. at 489. After Dixon discovered that K.H. had called 911, he “grabbed [her] by the neck and pulled [her] into the room . . . [and] started choking [her].” Id. at 493. The police arrived while Dixon was choking K.H. Id. at 494.

The evidence presented at trial was sufficient to sustain Dixon’s conviction for class A felony rape.¹ However, Dixon emphasizes that the State alleged in the charging information that he knowingly or intentionally compelled K.H. to submit to sexual intercourse “by the use of deadly force, that is: choking [K.H.]” Trial App. p. 84 (emphasis added). Because the evidence at trial showed that Dixon did not choke K.H. until after the forced sexual encounter, Dixon argues that his conviction must be reversed.²

Although the charging information alleged that Dixon used the deadly force of choking to commit the rape and the evidence at trial showed, instead, that he used knives to threaten K.H. during the encounter, not all variances between a charging information and the evidence presented at trial are fatal:

¹ See Ind. Code § 35-42-4-1 (a person who knowingly or intentionally has sexual intercourse with a member of the opposite sex by using or threatening deadly force or while armed with a deadly weapon commits class A felony rape).

² As the post-conviction court noted, our Supreme Court has previously held that the threat of deadly force does not have to occur contemporaneously with the sex crime to sustain a conviction. See, e.g., Gonzales, 532 N.E.2d at 1168 (holding that defendant’s threats to kill the victim after he raped her and she tried to escape were sufficient to support a finding that defendant threatened to use deadly force to commit rape). However, as Dixon emphasizes, the defendant in Gonzales continued to rape his victim after threatening her with deadly force after her attempted escape. In Spurlock, our Supreme Court concluded that a defendant’s threat to kill his child victim after he had molested her was “not made to coerce the victim to submit to his demands. . . . [T]he threat must facilitate the offense, not its coverup.” 675 N.E.2d at 316. Thus, our Supreme Court concluded that the Spurlock’s threat of deadly force did not warrant enhancing his conviction from a class C to a class A felony because it was not made to facilitate the offense.

Here, Dixon choked K.H. after he had completed the sex crimes and because he was angry that she had called the police. Tr. p. 563. Unlike the defendant in Gonzales, Dixon did not commit another sex crime after making the threat of deadly force—choking—that the State relied upon in the charging information. Thus, the timing of events in this case lies within uncharted precedential waters—Dixon choked K.H. after completing the sex offenses and after she had summoned help. Because we ultimately conclude that the variance between the charging information and the evidence presented at trial is not fatal, we will not address whether Dixon’s class A felony rape conviction could be sustained solely on the evidence that he threatened K.H. with deadly force by choking her.

A variance is an essential difference between proof and pleading. Not all variances, however, require reversal and as a general proposition, failure to make a specific objection at trial waives any material variance issue. Nevertheless, a variance is deemed fatal if the defendant is misled by the charge in the “preparation and maintenance of his defense, [and if he was] harmed or prejudiced thereby.”

Reinhardt v. State, 881 N.E.2d 15, 17 (Ind. Ct. App. 2008) (quoting Childers v. State, 813 N.E.2d 432 (Ind. Ct. App. 2004)).

While Dixon points out the difference between the charging information and the evidence presented at trial, he does not argue that he was misled or prejudiced by the variance. He fails to articulate how his rights were violated by the variance or how it affected his preparation or presentation of a defense. In fact, Dixon’s defense to the rape charge was based upon his assertion that the sexual encounter was consensual. Tr. p. 543. Thus, the variance is not fatal because there is no reason to believe that Dixon’s defense would have changed had the charging information alleged that he threatened deadly force to compel K.H. to submit to sexual intercourse with him by using two knives instead of alleging that he choked her.

In sum, the evidence presented at trial was sufficient to sustain Dixon’s conviction for class A felony rape, and the variance was not fatal. Consequently, we conclude that Dixon was not prejudiced by his trial counsel’s decision not to move for a judgment on the evidence.

III. Appellate Counsel

Dixon argues that his appellate counsel was ineffective for failing to challenge the sentences the trial court imposed for his class A felony criminal deviate conduct³ and class C felony battery convictions. Specifically, Dixon argues that the trial court improperly relied upon the nature and circumstances of the offense to enhance the sentence on Dixon's criminal deviate conduct conviction and that the trial court should not have ordered the sentence for Dixon's battery conviction to run consecutively to his other convictions.

We review claims of ineffective assistance of appellate counsel using the same standard applicable to claims of trial counsel ineffectiveness. Fisher v. State, 810 N.E.2d 674, 676 (Ind. 2004). The defendant must show that appellate counsel was deficient in his performance and that the deficiency resulted in prejudice. Id. Ineffective assistance claims at the appellate level of proceedings generally fall into three basic categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. Id.

Dixon presents a claim based on the second category. To prevail on a claim of this nature, a defendant must show from the information available in the trial record or otherwise known to appellate counsel that appellate counsel failed to present a significant and obvious issue and that this failure cannot be explained by any reasonable strategy. Ben-Yisrayl v. State, 738 N.E.2d 253, 261 (Ind. 2000). Additionally, our

³ Dixon was convicted of two counts of criminal deviate conduct. However, his argument focuses on his sentence for Count III—the charge alleging that he forced K.H. to submit to anal sex while he was armed with a deadly weapon.

Supreme Court has emphasized that we need to be deferential to appellate counsel when analyzing which issues were raised on appeal:

[T]he reviewing court should be particularly sensitive to the need for separating the wheat from the chaff in appellate advocacy, and should not find deficient performance when counsel's choice of some issues over others was reasonable in light of the facts of the case and the precedent available to counsel when that choice was made.

Timberlake v. State, 753 N.E.2d 591, 605 (Ind. 2001).

A. Criminal Deviate Conduct Sentence

Dixon argues his appellate counsel was ineffective for failing to raise an argument regarding the propriety of the trial court's decision to enhance his sentence for criminal deviate conduct because of the physical trauma that K.H. endured as a result of the offense. A trial court may rely upon the impact a crime had on a victim if it "explain[s] why the impact in the case at hand exceeds that which is normally associated with the crime." Hildebrandt v. State, 770 N.E.2d 355, 359 (Ind. Ct. App. 2002). Here, the trial court emphasized that it was enhancing Dixon's sentence for criminal deviate conduct because of testimony from K.H. and police officers that K.H. had "a very difficult [time] sitting down" after the offense. Tr. p. 752. In fact, as a result of Dixon's offense, K.H. suffered from anal bleeding and had prolonged difficulty with walking. Id. at 271, 414. Because the trial court explained why the impact of Dixon's crime exceeded the impact typically associated with a crime of that nature, Dixon has not shown that his appellate counsel failed to present a significant and obvious issue that cannot be explained by any reasonable strategy. Thus, we cannot conclude that his appellate counsel was ineffective.

B. Battery Sentence

Dixon argues that his appellate counsel was ineffective for failing to raise an argument regarding the propriety of the trial court's decision to run his sentence for battery consecutively to the other sentences. While Dixon acknowledges that the trial court had "broad authority to order consecutive sentences," appellant's br. p. 14, he takes issue with the trial court's decision to run the sentence consecutively because of the nature of the bite mark Dixon inflicted on K.H. Dixon argues that because class C felony battery contains a serious bodily injury element, the trial court erred by relying on the severity of the wound. See Ind. Code § 35-42-2-1 (a person who knowingly or intentionally touches another person in a rude, insolent, or angry manner resulting in serious bodily injury commits class C felony battery).

It is well established that "even when serious bodily injury is an element of the crime charged, the severity of the injury may serve as a valid aggravating circumstance." Patterson v. State, 846 N.E.2d 723, 731 (Ind. Ct. App. 2006). In sentencing Dixon on the battery conviction, the trial court opined that "I'm not sure that this Court or any other person associated with the criminal justice system has ever seen a bite mark the size of that which was taken out of [K.H.'s cheek]." Tr. p. 753. Because of the magnitude of the wound, Dixon has not shown that his appellate counsel failed to present a significant and obvious issue that cannot be explained by any reasonable strategy.⁴

⁴ Dixon also argues that his appellate counsel was ineffective for not challenging the sufficiency of the evidence supporting his rape conviction. Because we have already concluded that there was sufficient evidence to sustain that conviction, we need not address Dixon's argument further.

The judgment of the post-conviction court is affirmed.

RILEY, J., and ROBB, J., concur.